UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED PARCEL SERVICE, INC.,

Respondent,

-and- Case 07-CA-164488

CORNELIUS SEARCY,

Charging Party.

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POST-HEARING BRIEF OF UNITED PARCEL SERVICE, INC.

United Parcel Service, Inc. ("Respondent," "UPS," or "Company) submits the following post-hearing brief. The UPS Proposed Findings and Conclusions is being filed contemporaneously with this Post-Hearing Brief.

STATEMENT OF THE CASE

Cornelius Searcy ("Charging Party") filed an unfair labor practice charge against UPS on November 19, 2015. The charge was amended on December 11, 2015, and January 26, 2016. On March 29, 2016, the Regional Director issued a Decision to partially dismiss the portion of the Amended Charge alleging that Respondent discrimination against Charging Party in retaliation in violation of Section 8(a)(3) of the National Labor Relations Act ("Act"). On April 25, 2016, the Regional Director issued a Complaint alleging that Respondent had committed certain violations of Section 8(a)(1) of the Act. Respondent filed a timely answer to the Complaint, denying the material allegations. Administrative Law Judge Flynn held a July 7, 2016 trial on the matter.

STATEMENT OF FACTS

Pertinent facts are set forth in the UPS Proposed Findings and Conclusions, which is being filed contemporaneously with this Post-Hearing Brief.

ARGUMENT

A. There Was No Objectively Reasonable Belief That Mr. Searcy Was Participating In An Investigatory Interview Whose Significant Purpose Was To Obtain Facts To Support Disciplinary Action That Was Probable Or That Was Even Being Considered.

The Court in *Weingarten* noted that the right to representation is limited and does "not apply... to ... run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 - 258 (1975) (*quoting Quality Mfg. Co.*, 195 NLRB 197, 199 (1972). Reasonableness is measured by objective standards, and not "an employee's subjective motivations." *Id.* at fn. 5. Here, ALJ Flynn recognized that the standard is an objective standard: "[Ii]t's an objective standard." (*See* Trial Transcript p. 46; UPS Proposed Findings and Conclusions).

In this matter, the record evidence establishes that there was no objectively reasonable belief that Mr. Searcy was participating in an investigatory interview whose significant purpose was to obtain facts to support disciplinary action that was probable or that was even being considered. (*See e.g.,* UPS Proposed Findings and Conclusions). Not even Mr. Searcy's litigation-induced, subjective testimony equates to a reasonable belief or an objectively reasonable belief that he was participating in an investigatory interview whose significant purpose was to obtain facts to support disciplinary action that was probable or that was even

being considered. (*See e.g.*, UPS Proposed Findings and Conclusions).

Under the circumstances of this case, no one could reasonably expect that the June 18, 2015 meeting would result in discipline, especially when Mr. Godfrey assured Mr. Searcy that the meeting was not disciplinary and Mr. Searcy knew that his signed Temporary Alternate Work Offer – Michigan did not include the job duty of delabeling bags as temporary alternate work. (See e.g., UPS Proposed Findings and Conclusions); *ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB*, 719 F.2d 851, 853 (6th Cir. 1983) ("limit[ing] this [Weingarten] right to situations in which (1) the meeting is investigatory . . . [and] (2) the employee reasonably expects the meeting will result in disciplinary action"); *NLRB v. USPS*, 689 F.2d 835, 837-839, 1982 U.S. App. LEXIS 25048, *4-10, 111 L.R.R.M. 2621, 95 Lab. Cas. (CCH) P13,805 (9th Cir. 1982). Indeed, Mr. Godfrey's specifically telling Mr. Searcy that the June 18, 2015 meeting was not disciplinary makes any belief to the contrary unreasonable and the law supports this conclusion. See *NLRB v. USPS*, 689 F.2d 835, 837-839, 1982 U.S. App. LEXIS 25048, *4-10, 111 L.R.R.M. 2621, 95 Lab. Cas. (CCH) P13,805 (9th Cir. 1982); *Stewart-Warner Corp.*, 253 N.L.R.B. 136, 147 (1980) (An employee asked "whether he was going to be disciplined" and the employer replied "No, we just want to talk.") (internal quotation omitted); *Bridgeport Hospital,* 265 N.L.R.B. 421, 425 (1982) (An employer told a group of employees that "he did not contemplate taking disciplinary action against any of [them] as a result of [the] meetings.").

The simple fact that Mr. Searcy met with Mr. Godfrey and Mr. Crepeau to discuss his restrictions and temporary alternate work does not magically turn the June 18, 2015 meeting into an investigatory meeting or turn any belief about the meeting into a reasonable belief or an objectively reasonable belief. *See Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, *410 (9th Cir. 1978) (noting that "a supervisory interview in which the employee is questioned or instructed

about work performance inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the right to the assistance of a union representative. Indeed, the right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered."). Here, the record facts establish that disciplinary action was not probable. (*See e.g.,* UPS Proposed Findings and Conclusions). Disciplinary action was not being considered. (*See e.g.,* UPS Proposed Findings and Conclusions). Discipline was not an option. (See e.g., UPS Proposed Findings and Conclusions). Mr. Godfrey even told Mr. Searcy that the meeting was not disciplinary. (*See e.g.,* UPS Proposed Findings and Conclusions). Mr. Searcy was not disciplined or discharged as a result of his not delabeling bags on June 18, 2015. (*See e.g.,* UPS Proposed Findings and Conclusions). He had the option to either delabel bags or as the evidence established, go home for the day. (*See e.g.,* UPS Proposed Findings and Conclusions). He went home for the day rather than delabel bags as he felt that his medical restrictions did not permit him tom delabel bags. (*See e.g.,* UPS Proposed Findings and Conclusions).

No purpose of the meeting was to obtain facts to support disciplinary action. *See e.g.,* UPS Proposed Findings and Conclusions). Mr. Godfrey simply sought clarification about Mr. Searcy's work restrictions and that was the purpose of the June 18, 2015 meeting. (*See e.g.,* UPS Proposed Findings and Conclusions); *Stewart-Warner*, 253 N.L.R.B. 136, 147 (1980) (considering that the meeting was "nothing more than an effort to obtain clarification of [the employee's duties"). Seeking clarification is not impermissible and does not invoke *Weingarten* rights. *See NLRB v. USPS*, 689 F.2d 835, 837-839, 1982 U.S. App. LEXIS 25048, *4-10, 111 L.R.R.M. 2621, 95 Lab. Cas. (CCH) P13,805 (9th Cir. 1982) (no objectively reasonable fear of

being disciplined when the employee is told that the meeting is not disciplinary); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410 (9th Cir. 1978) ("The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.").

Additionally, the June 18, 2015 meeting was not investigatory. (*See e.g.,* UPS Proposed Findings and Conclusions). Mr. Godfrey did not ask Mr. Searcy any questions intended to elicit additional information that might lead to discipline. Rather, Godfrey asked questions seeking clarification about Mr. Searcy's restrictions and his temporary alternate work. (*See e.g.*, UPS Proposed Findings and Conclusions). Asking such questions does not make the meeting investigatory. *ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB*, 719 F.2d 851, 853 (6th Cir. 1983). Even Mr. Searcy's comments during the meeting related to his ideas about what his temporary alternate work included. (*See e.g.,* UPS Proposed Findings and Conclusions)

The policies underlying the *Weingarten* rule do not support applying it to this situation. Mr. Searcy did not need *Weingarten* rights to provide clarification regarding his idea about his restriction and temporary alternate work. Further, exercise of *Weingarten* rights may not interfere with legitimate employer prerogatives. *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953 (6th Cir. 1980). In this matter, UPS had a legitimate prerogative to seek clarification from Mr. Searcy about his work restriction. Nothing about the June 18, 2015 meeting raised Weingarten as it was a discussion and not an investigatory meeting.

CONCLUSION

Respondent requests that the complaint be dismissed in its entirety.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

Bonnie Mayfield of Dykema Gossett PLLC certifies that on August 11, 2016, she electronically filed the foregoing paper in Case 07-CA-164488 with the National Labor Board's Division of Judges, had hand delivered three copies of the foregoing to the Judge's Division, and also served a copy upon the following persons by e-mail pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations:

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